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**INTRODUCTION: ANGLES OF THE RIGHT TO  
COUNSEL IN CIVIL CASES DEBATE: FORMALISM,  
IMMIGRATION, REVIEWABILITY, AND  
EMPIRICISM**

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Given the recent celebrations of *Gideon v. Wainwright*'s 50<sup>th</sup> anniversary,<sup>1</sup> it is most appropriate that this Symposium issue focuses on the civil right to counsel. While *Gideon* was only about the right to counsel in criminal cases, many of the events and articles marking the anniversary discussed the interplay between criminal and civil cases,<sup>2</sup> even reaching the front page of the *New York Times*<sup>3</sup> and various radio shows.<sup>4</sup> Yet historically, criminal and civil cases have rarely been discussed simultaneously. And it is a problem that goes beyond

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>2</sup> See e.g. Mark Juhas, *On the Anniversary of Gideon, An Argument for Free Civil Representation*, 36-SEP L.A. Law. 44 (Sept. 2013), available at <http://www.lacba.org/Files/LAL/Vol36No6/3078.pdf>; John Pollock, *Gideon and Civil Right to Counsel: Two Sides of a Coin*, 34 NLADA Cornerstone 24 (2013), available at [http://www.nlada.org/Publications/Cornerstone\\_Issues/Cornerstone34-1/](http://www.nlada.org/Publications/Cornerstone_Issues/Cornerstone34-1/).

<sup>3</sup> Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES, Mar. 15, 2013, <http://www.nytimes.com/2013/03/16/us/16gideon.html?pagewanted=2&hp&pagewanted=print>.

<sup>4</sup> *Radio Times: The Justice Gap – The Challenge of Providing Legal Services For Poor People* (WHYY Public Media radio broadcast Mar. 2013), available at <https://soundcloud.com/whyy-public-media/the-justice-gap-the-challenge>; *Midday With Dan Rodricks: Gideon at 50* (WYPR radio broadcast Mar. 18, 2013), available at [programs.wypr.org/podcast/gideon-50-monday-march-18-1-2-pm](http://programs.wypr.org/podcast/gideon-50-monday-march-18-1-2-pm).

conversations into practice: Jim Neuhard, the onetime Director of the Michigan State Appellate Defender Office, once observed, “[t]he United States is one of the only countries that separates civil and criminal legal services so completely.”<sup>5</sup> John Gross, Indigent Defense Counsel for the National Association of Criminal Defense Lawyers, recently remarked that attempts to distinguish criminal and civil cases based on perceived value of counsel or alternative safeguards available create a “distinction without a difference.”<sup>6</sup>,

The criminal-civil divide is but one of the worthy civil right to counsel topics that this Symposium addresses. Others include: should the right to counsel in civil cases be determined on a case-by-case basis, or should the right be categorical? Ought it extend to immigration proceedings? If we recognize a right to counsel in immigration cases, should a violation of that right automatically require a reversal of any deportation order? Should a criminal defense attorney’s failure to advise her client of the immigration consequences of pleading guilty be considered presumptively prejudicial and require reversal of the criminal plea? And more generally, how can we best measure the effects of providing counsel in civil cases?

## I. BACKGROUND ON RIGHT TO COUNSEL

In 1963, the U.S. Supreme Court held in *Gideon* that there is a categorical right to state-funded counsel for indigent criminal defendants in felony cases. Abandoning the case-by-case approach it had adopted a mere 20 years before in *Betts v. Brady*,<sup>7</sup> the Court spoke eloquently about how

Even the intelligent and educated layman has small and sometimes no skill in the science of law ... He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise

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<sup>5</sup> Jim Neuhard, *Gideon Redux: A Defender's View*, CORNERSTONE (Nat’l Legal Aid & Defender Ass’n, D.C.), Fall 2006, at 5, 31, available at <http://www.civilrighttocounsel.org/pdfs/Neuhard%20-%20Gideon%20Redux%20A%20Defender's%20View.pdf>.

<sup>6</sup> John Gross, *The True Benefits of Counsel: Why “Do-It-Yourself” Lawyering Does Not Protect the Rights of the Indigent*, 43 N.M. L. REV. 1 (Spring 2013), available at <http://lawlibrary.unm.edu/nmlr/volumes/43/1/NMX102.pdf>.

<sup>7</sup> *Betts v. Brady*, 316 U.S. 455 (1942).

inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.<sup>8</sup>

Less than a decade after *Gideon*, the Court extended the right to counsel to misdemeanor cases,<sup>9</sup> culminating a 40-year journey on right to counsel that had begun in 1932 with indigent defendants in capital cases.<sup>10</sup>

The jurisprudential path for civil cases has been quite different. In certain types of civil cases, indigent litigants can face consequences equally severe to criminal defendants, such as eviction or foreclosure, domestic violence, loss of life-sustaining benefits or medical care, and loss of child custody. The ABA has identified these as “basic human needs” cases, and in 2006 unanimously passed a resolution supporting a right to counsel in such cases.<sup>11</sup> In some other civil matters, such as civil contempt or immigration, litigants even face imprisonment or confinement just like in criminal cases. But as has been detailed elsewhere,<sup>12</sup> the Supreme Court has balked at recognizing a federal constitutional right to counsel in such proceedings, preferring to maintain the divide between “criminal” and “civil” cases and only providing significant procedural protections for the former. The states, however, have been more solicitous on civil right to counsel, with many providing a right by statute or constitutional decision in matters such as abuse or neglect, termination of parental rights, adoption, civil

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<sup>8</sup> *Gideon*, 372 U.S. at 345.

<sup>9</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>10</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>11</sup> See ABA Resolution 112A (Aug. 2006), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf) (urging federal, state, and territorial governments to adopt a right to counsel in civil cases involving basic human needs).

<sup>12</sup> For a detailed history of the development of right to counsel jurisprudence in both criminal and civil cases, see John Pollock, “*You Have a Right to a Lawyer ... If You Can Afford It*”: A Look at the History of the Right to Counsel in Civil Cases and the Current Efforts to Expand It, *Bloomberg BNA Vol. 81 No. 48* at 1797 (June 18, 2013), available at <http://civilrighttocounsel.org/pdfs/RTChistoryBloomberg.pdf>. Besides the cases that article mentions, other civil cases where the U.S. Supreme Court has refused to recognize a right to counsel include *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (revocation of probation); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (prison disciplinary proceedings); and *Goss v. Lopez*, 419 U.S. 565 (1975) (short-term school suspensions).

contempt, civil commitment, guardianship, or paternity.<sup>13</sup> Recently, a few courts became the first to recognize any kind of right to counsel for domestic violence cases.<sup>14</sup>

## II. THE CRIMINAL-CIVIL DIVIDE, AND THE CASE-BY-CASE APPROACH

In *The Trumpet Player's Lament: Rethinking the Civil Gideon Movement*, Chad Flanders and Alexander Muntges question whether it is appropriate to treat criminal and civil cases differently with respect to whether counsel should be provided.<sup>15</sup> They note that many civil proceedings have the “trappings” of criminal matters (serious consequences, adversarial process, state as opponent, and so on), while some criminal cases might be relatively straightforward and unadversarial. They also point out that even when the state is not technically the plaintiff in a civil proceeding, it nonetheless may be heavily involved behind the scenes. Some courts have already recognized this. For instance, in the contested adoption context, a birth parent's rights are permanently terminated through the actions of a private party, but some courts have pointed out the ways in which the state is nonetheless involved and held it is a violation of equal protection to provide counsel in a state-initiated termination but deny it in a contested adoption.<sup>16</sup> The state can also be involved in other types of “private” proceedings, like foreclosures.<sup>17</sup>

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<sup>13</sup> Laura Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 245 (2006), available at [http://brennan.3cdn.net/2f2ca53878e9299012\\_67m6ib9tv.pdf](http://brennan.3cdn.net/2f2ca53878e9299012_67m6ib9tv.pdf); Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. J. POVERTY L. AND POL'Y 186 (2006), available at [http://civilrighttocounsel.org/pdfs/pastore\\_lassiter.pdf](http://civilrighttocounsel.org/pdfs/pastore_lassiter.pdf).

<sup>14</sup> *In re D.L.*, 189 Ohio App. 3d 154, 2010-Ohio-1888, 937 N.E.2d 1042 (finding due process right to counsel for juvenile respondents in protection order proceedings); *J.L. v. G.D.*, 29 A.3d 752 (N.J. Super. Ct. Ch. Div. 2010) (holding that minor petitioner in protection order is entitled to a guardian ad litem, but also that the guardian must be an attorney).

<sup>15</sup> 17 D.C. L. Rev. (forthcoming Spring 2014).

<sup>16</sup> *See In re Adoption of K.A.S.*, 499 N.W.2d 558, 565-66 (N.D. 1993). In *K.A.S.*, the court rejected the argument that the state was not an active participant in the adoption process, commenting that “this argument understates the actual involvement of the state in a stepparent adoption under the Adoption Act . . . . The state's participation continues throughout the adoption process.” It pointed out that the court clerk prepared the application for birth record and forwarded the adoption decree to the state Department of Human Services, and the court was “required to ensure the legislatively mandated confidentiality of the proceedings and records.”

Flanders and Muntges also observe that the states decide whether to attach a “criminal” or “civil” label to proceedings, which in turn determines how much process is due. This, they argue, utilizes a formalism that has no legal or logical basis, a sentiment that has been supported by some public defenders.<sup>18</sup> Flanders and Muntges point to the U.S. Supreme Court’s recent opinion in *Turner v. Rogers* (which found no right to counsel for indigent parents in child support civil contempt proceedings, even where the parent is jailed for a year) as the height of this formalistic approach.<sup>19</sup>

Flanders and Muntges then suggest a “thought experiment:” what if the right to counsel in civil *and* criminal cases was on a case-by-case basis? In their thought experiment, they argue that given the problems funding indigent defense, there is no reason to believe it will be different with civil cases, and that it would be more politically viable to accept a *Betts v. Brady*-type case-by-case approach, which required appointment of counsel in criminal cases only where “special circumstances” exist.<sup>20</sup> They also suggest that a categorical right to counsel like *Gideon* is as rigidly formulaic as the criminal-civil distinction, whereas due process calls for a more flexible, adaptable approach. Utilizing a case-by-case “fundamental fairness” approach for both criminal *and* civil cases, they argue, would 1) benefit civil cases since advocates would no longer have to compare a civil matter to criminal cases in order to justify a right to counsel; and 2) benefit criminal cases because states might experiment with other effective models besides appointment of counsel, such as improving or simplifying procedures. Flanders and Muntges concede in their conclusion that they are not actually recommending a return to *Betts* in practice, but argue that their thought experiment will help advocates

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Moreover, state agencies were “involved throughout the proceedings,” since the statute required the petitioner to name the state or a county social service board as a party and as named party the state could participate fully in all proceedings.

<sup>17</sup> See John Pollock, *Going Public: The State-Action Requirement of Due Process in Foreclosure Litigation*, 43 CLEARINGHOUSE REV. J. POVERTY L. AND POL’Y 458, 462 (Jan.-Feb. 2010), available at <http://www.civilrighttocounsel.org/pdfs/2010-Jan-Feb-Pollock-state-action.pdf> (discussing ways in which state involvement can be demonstrated in judicial foreclosure states so as to meet “state action” requirement of due process claims).

<sup>18</sup> For more on this, see generally Gross, 43 N.M. L. REV. at 1.

<sup>19</sup> *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

<sup>20</sup> See *Miranda v. Arizona*, 384 U.S. 436, 469 n.38 (1966) (referring to *Betts* and “and the recurrent inquiry into special circumstances it necessitated.”)

avoid being “imprisoned by *Gideon*’s concepts.” I have several responses to this thought experiment.

First, Flanders and Muntges have a point about the difficulties civil right to counsel advocates face when forced to compare civil cases to criminal ones. Some types of extremely important civil cases (such as housing or termination of parental rights) cannot easily be compared to criminal cases, such as those civil cases that lack the threat to physical liberty that the U.S. Supreme Court has emphasized so heavily. However, many state and federal courts have been aware that their focus properly lies on the interest at stake and not whether the state has chosen to use the “criminal” or “civil” label.<sup>21</sup> This demonstrates that the battle against formalism might be won without resorting to a lesser case-by-case approach.

Second, it is undeniable that the funding crisis in indigent defense presents a challenge for civil right to counsel advocacy, but this does not necessarily lead to the conclusion that Flanders and Muntges reach regarding adoption of a case-by-case approach. I co-authored an article with former ABA President Michael Greco in which we suggested that this funding crisis should not be the reason advocates accept a lesser form of protection for civil litigants.<sup>22</sup> We argued that

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<sup>21</sup> See, e.g., *Salas v. Cortez*, 593 P.2d 226, 229 (Cal. 1979) (finding right to counsel in paternity cases, and commenting that right to due process and to be heard “has been held to include the right of a defendant to appointed counsel under certain circumstances, regardless of whether the action is labelled criminal or civil. For example, where the deprivation the defendant faces is significant and the facts are complex, due process has been held to include the right of an indigent defendant to appointed counsel in certain civil proceedings.”) (citations omitted); *State ex rel. Hamilton v. Snodgrass*, 325 N.W.2d 740, 742 (Iowa 1982) (holding in paternity case that “The trial court was wrong in rejecting Snodgrass’s application on the basis of a distinction between civil and criminal proceedings. Some proceedings which are called civil require appointment of counsel so it is not a question of labeling the action criminal or civil. The right to counsel has more to do with a person’s stake in the proceeding and the practical effect of the outcome”); *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968) (addressing a civil commitment case and commenting “[L]ike Gault, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in Gault emphatically applies. It matters not whether the proceedings be labeled ‘civil’ or ‘criminal’ or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration— whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent— with commands observance of the constitutional safeguards of due process.”).

<sup>22</sup> John Pollock & Michael Greco, *It’s Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. 40, 50 (2012), available at

not only do we lack evidence of newly added civil rights to counsel worsening the indigent defense situation, but some observers have pointed out that providing counsel in civil cases can actually help mitigate the indigent defense crisis.<sup>23</sup> Additionally, as Clare Pastore discusses in her Symposium article, civil right to counsel advocates are conducting empirical research on the ways in which providing counsel might *save* money and improve efficiency, rather than draining resources.<sup>24</sup> It is not difficult to see how this could be true: a litigant spared eviction, for example, will not have to rely on state-funded homeless shelters or public housing, and a litigant who preserves her medical benefits may not have to utilize the emergency room in a fashion that can be significantly more expensive to taxpayers.

Third, as a practical matter, there is ample evidence that the case-by-case approach risks creating more problems than it solves. I have spoken about this at length in another article,<sup>25</sup> but a few points are worth reiterating. In his dissent in *Lassiter v. Dep't of Soc. Servs.*, which adopted a case-by-case approach for termination of parental rights cases,<sup>26</sup> U.S. Supreme Court Justice Blackmun observed the impossibility of judges attempting to predict early in a trial (i.e., prior to the evidence being heard) whether counsel will be necessary.<sup>27</sup>

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<http://www.pennlawreview.com/online/161-U-Pa-L-Rev-PENNumbra-40.pdf>

<sup>23</sup> See, e.g., Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 567 (1988) (observing that “The homeless who live on the streets are potentially subject to the loss of their physical liberty through incarceration and institutionalization”); Hong Tran, *Bridging the Divide Between Civil Legal Aid Lawyers and Public Defenders*, 47 CLEARINGHOUSE REV. J. POVERTY L. AND POL’Y 30 (May-June 2013).

<sup>24</sup> Clare Pastore, *Gideon is My Co-Pilot: The Promise of Civil Right to Counsel Pilot Programs*, 17 D.C. L. Rev. (forthcoming Spring 2014).

<sup>25</sup> John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 DRAKE L.R. 763 (2013), available at

<http://civilrighttocounsel.org/pdfs/caseagainstcasebycase.pdf>.

<sup>26</sup> 452 U.S. 18 (1981).

<sup>27</sup> Justice Blackmun pointed out the impossibility of a trial court judge “determin[ing] in advance what difference legal representation might make. . . . [The trial judge must] examine the State’s documentary and testimonial evidence well before the hearing so as to reach an informed decision about the need for counsel in time to allow adequate preparation of the parent’s case.” *Id.* at 51 n.23 (Blackmun, J., dissenting). See also Lavertue v. Niman, 493 A.2d 213, 219 (Conn. 1985) (“We decline to follow such [a case-by-case] approach, not only because of the unique evidentiary problems of our paternity proceedings, but because [i]t is often difficult to assess the complexities which might arise in a given paternity trial before that trial

Moreover, judges in one state or in one part of a state might be more or less inclined to appoint counsel in certain types of cases, leading to “justice by geography.” In *Gideon* itself, an amicus brief filed by 22 states in support of the right to counsel gave an example of three pairs of cases where “each set [] contained within itself substantially similar fact situations, [but] the right to appointed counsel was denied in the first case of each pair, [and] upheld in the second—clearly a consequence of the vague standard of ‘denial of fundamental fairness’ which *Betts* has advanced.”<sup>28</sup> In some cases where appointed counsel is wrongfully denied, the litigant may fail to preserve the issue or lack the resources to appeal, meaning the errors will not be corrected. But even if the appellate court can review the denial, it will be reviewing a record developed without the benefit of counsel, and consequently will be both one sided and incomplete, leading the appellate court to believe that counsel is not needed to ensure fundamental fairness. As one court observed, “[I]t is circular to look to the record to determine whether counsel could have affected the result, when one of the principal missions of counsel in any litigation is to develop the record.”<sup>29</sup>

These concerns are not merely hypothetical: some courts already take a case-by-case approach to appointment of counsel in various civil cases, and the results have been far from exemplary. As a number of academics have noted, courts often improperly perform the case-by-case test or in some cases skip it entirely.<sup>30</sup> And as my other article notes, the federal courts have struggled with the case-by-case approach under various federal appointment statutes.<sup>31</sup> In particular, there is a

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is held; thus, a case-by-case approach would necessarily require an after-the-fact evaluation of the record to determine whether appointed counsel could have affected the result reached in a paternity proceeding.” (alteration in original) (quoting *Corra v. Coll*, 451 A.2d 480, 488 n.11 (Pa. Super. Ct. 1982)) (internal quotation marks omitted)).

<sup>28</sup> Brief for the State Government Amici Curiae at 18, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155), 1962 WL 75209, at \*3.

<sup>29</sup> *State ex rel. Adult and Family Servs. Div. v. Stoutt*, 644 P.2d 1132, 1137 (Or. Ct. App. 1982).

<sup>30</sup> See Pastore, 40 CLEARINGHOUSE REV. J. POVERTY L. AND POL’Y at 187 (noting how difficult it is to determine whether trial courts are actually performing a Lassiter analysis); William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 LOY. U. CHI. L.J. 195, 201–02 (1996) (noting that many trial courts skip Lassiter hearings, resulting in a lack of evidence that might prove a right to counsel).

<sup>31</sup> Pollock, 768 DRAKE L.R. at 768-69.



tricky Catch-22: litigants who are more articulate and present coherent claims are determined to be less in need of counsel to protect fundamental fairness, while less capable litigants are unable to intelligibly articulate why their case has merit.<sup>32</sup> Moreover, judges (especially those who are elected, as opposed to appointed) might be reluctant to appoint counsel in large numbers of cases given the cost to the county or state, whereas if there is a categorical right to counsel, they are immune from such pressure. Conversely, some commentators have noticed the way that the mere presence of counsel can positively change the way the court and opposing counsel behave.<sup>33</sup>

In support of the case-by-case approach for criminal cases, Flanders and Muntges rely on Justice Harlan's concurrence in *Gideon* that suggested that under the *Betts* test, courts were increasingly finding "special circumstances" in nearly all criminal cases. This, Flanders and Muntges argue, diminishes the concern about using a case-by-case approach. However, twenty-two states joined an amicus brief in *Gideon* urging the Court to abandon the case-by-case approach adopted in *Betts* and arguing that "the rule has been, and is being, inconsistently and confusingly applied, and the appellate decisions are contradictory and almost invariably marked with sharp dissents."<sup>34</sup> Moreover, the *Gideon* majority characterized *Betts* as "a continuing source of controversy and litigation in both state and federal courts."<sup>35</sup> This suggests that the appointment situation under the case-by-case approach may not have been nearly as uniform as Justice Harlan made it out to be.

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<sup>32</sup> *Id.* at 769-70.

<sup>33</sup> In her article for this Symposium, Clare Pastore points out the observation of some of the California Shriver housing pilots that the mere presence of counsel in the courtroom with tenants may cause a paradigm shift in landlord behavior, a result that it is hard to imagine occurring with *pro se* assistance alone, or even limited scope representation. Pastore, 17 D.C. L. Rev. (forthcoming Spring 2014). See also Laura Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 40 CLEARINGHOUSE REV. J. POVERTY L. AND POL'Y 271 (2006), available at [http://brennan.3cdn.net/99d59f86456a2170c1\\_dwm6bhbc2.pdf](http://brennan.3cdn.net/99d59f86456a2170c1_dwm6bhbc2.pdf) ("The mere presence of lawyers in all cases means that criminal courts often pay more attention to due process and other constitutional rights than many civil courts do. E.g., in the Chicago Housing Court, where only 5 percent of tenants facing eviction have lawyers, hearings typically last less than two minutes, and judges frequently fail to observe important procedural protections such as swearing in witnesses, asking tenants if they have a defense, and examining the landlord's eviction notice.").

<sup>34</sup> Brief for the State Government, *supra* note 28, at 3.

<sup>35</sup> *Gideon*, 372 U.S. at 338.

It is certainly true, as Flanders and Muntges assert, that the civil right to counsel has not expanded quickly, and it will not do for us to simply “assert[] that we need to try harder.” But the organized movement is rather young: the National Coalition for a Civil Right to Counsel (the only group dedicated exclusively to the issue) was created only ten years ago<sup>36</sup> and has already weathered a serious economic recession. Furthermore, the pilot projects, which have only recently begun, may provide ammunition for unlocking new streams of funding and may help us understand the classes of cases where providing counsel is the highest priority. While we have far to go, in a way we have only just begun.

### III. IMMIGRATION: THE NEXT CIVIL RIGHT TO COUNSEL FRONTIER?<sup>37</sup>

In her article, *Immigration is Different: Why Congress Should Guarantee Access to Counsel in all Immigration Matters*, Careen Shannon calls for a right to counsel for all immigration proceedings, which she describes as a “pipe dream ... [that] really should not be a pipe dream.”<sup>38</sup> She urges Congress to act on the matter, rather than waiting for a court to recognize a constitutional right in such proceedings. In fact, as she acknowledges, the U.S. Senate passed legislation in 2013 that would extend a right to appointed counsel to unaccompanied minors, those who have mental disabilities, and others who are “particularly vulnerable” in immigration proceedings.<sup>39</sup> This legislation goes beyond what was originally proposed by a leaked White House bill, as that bill would have merely *allowed* the Attorney

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<sup>36</sup> John Pollock & Mary Deutsch Schneider, *Ten Years In and Picking Up Steam: A Retrospective on the National Coalition for a Civil Right to Counsel*, 47 CLEARINGHOUSE REV. J. POVERTY L. AND POL’Y 35 (May-June 2013), available at <http://civilrighttocounsel.org/pdfs/NCCRChistory.pdf>.

<sup>37</sup> The 2006 ABA Resolution mentioned earlier, which urges federal and state governments to adopt a right to counsel in “basic human needs” cases, lists five types of cases as examples: shelter, safety, sustenance, health, and child custody. While immigration is not on that list, a separate 2006 resolution addressed the right to counsel for immigration. ABA Resolution 107A (2006), available at <http://www.americanbar.org/content/dam/aba/events/aba-day/access%20to%20counsel%20policy.authcheckdam.pdf>.

<sup>38</sup> 17 D.C. L. Rev. (forthcoming Spring 2014).

<sup>39</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Cong. §3502(c), 2013.

General to appoint counsel in these types of proceedings.<sup>40</sup> Prior to passing its legislation, the Senate rejected an amendment by Senator Grassley to make the counsel provisions discretionary.<sup>41</sup> House Democrats introduced a bill in October 2013 that is based on the Senate legislation.<sup>42</sup>

Shannon, as well as Carla Reyes, author of *Access To Counsel In Removal Proceedings: A Case Study For Exploring The Legal And Societal Imperative To Expand The Civil Right To Counsel*,<sup>43</sup> note that despite being labeled “civil,” immigration proceedings have many of the attendant characteristics of criminal trials (such as incarceration and prosecution by the government), yet virtually none of the procedural protections (such as *Miranda* warnings, speedy trials, and the right to counsel). This situation reflects the formalism problem described by Flanders and Muntges in their article. Shannon points out the increasing trend of detaining immigrants (which worsens the problem of access to counsel, since detained immigrants can have more difficulty affording, retaining, and meeting with counsel) in facilities “barely distinguishable” from criminal jails.

In their analyses, both Shannon and Reyes essentially utilize the three factors the U.S. Supreme Court established in *Mathews v. Eldridge*<sup>44</sup> for determining the requirements of due process: the strength of the individual interest, the risk of error, and the government’s interest. They start with the serious interests at stake: life itself (if asylum is the claim), removal from one’s home and family, and extended detention, among others. As to the government’s interest, they point out the data demonstrating that providing counsel could save the federal government significant amounts of money, an argument that has been explored in other civil arenas.<sup>45</sup> Speaking to the risk of error, they observe that existing data has shown quite dramatically that immigrants with counsel avoid deportation at much

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<sup>40</sup> Shannon, 17 D.C. L. Rev. (forthcoming Spring 2014), referencing White House draft bill, Title I, Sec. 158, Increasing Access to Legal Services, available at <http://media.miamiherald.com/smedia/2013/02/18/19/40/1jxxul.S0.56.pdf>.

<sup>41</sup> See [http://www.judiciary.senate.gov/legislation/immigration/amendments/Grassley/Grassley40-\(MDM13346\).pdf](http://www.judiciary.senate.gov/legislation/immigration/amendments/Grassley/Grassley40-(MDM13346).pdf) (Grassley Amendment).

<sup>42</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113th Cong. §3502(c), 2013.

<sup>43</sup> 17 D.C. L. Rev. (forthcoming Spring 2014).

<sup>44</sup> 424 U.S. 319 (1976).

<sup>45</sup> Laura Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139 (Fall/Winter 2010) available at <http://www.law.seattleu.edu/Documents/sjsj/2010fall/Abel.pdf>.

higher rates than those without. Efforts are underway to collect new data: as noted by Shannon, groups in New York (led by federal Second Circuit judge Robert Katzmann) have been planning a pilot project to provide and study the effects of expanded counsel in immigration proceedings,<sup>46</sup> and recently the City of New York gave \$500,000 towards the effort.<sup>47</sup> The fact that the presence of counsel affects immigration case outcomes is hardly surprising: as Shannon notes, immigration cases are immensely complex due to both the underlying law and the different number of federal agencies that administer it. Reyes reminds us also about the “linguistic, cultural, educational, and ethnic barriers” that further complicate the proceedings.

Shannon’s article also highlights other aspects of the right to counsel discussion, such as people who are denied access to their retained counsel and those subject to attorney fraud. These additional problems demonstrate the length of the road we have to travel: even if we are successful at establishing a right to appointed counsel, such a right will be an empty one if not accompanied by standards of representation, guarantees of access, and regulations governing thorny issues, such as waiver of the right.<sup>48</sup>

Meanwhile, Reyes rates several potential delivery mechanisms: volunteer Court Appointed Special Advocates (CASAs, who could be lawyers or non-lawyers), a mandatory Legal Orientation Program (LOP), and appointed counsel. Her ratings are based on political feasibility, respect for due process, transparency, judicial economy, accountability, and likelihood of being successful. She concludes that LOPs do not provide enough help to ensure justice or due process, nor do they rate high enough in political feasibility or judicial economy to

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<sup>46</sup> Vera Institute, *New York Immigrant Family Unity Project*, <http://www.vera.org/project/new-york-immigrant-family-unity-project>; Steering Committee, New York Immigrant Representation Study Report, *Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings* (2012), available at [http://www.cardozolawreview.com/content/denovo/NYIRS\\_ReportII.pdf](http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf); Kirk Semple, *Plan Would Provide Help to Contest Deportation Cases*, N.Y. TIMES, Nov. 27, 2012, available at <http://www.nytimes.com/2012/11/28/nyregion/plan-would-add-lawyers-to-contest-deportation-cases.html?ref=nyregion>.

<sup>47</sup> Steven Nelson, *New York City Allocates \$500K to Fight Feds on Deportation*, U.S. NEWS & WORLD REPORT, July 17, 2013, available at <http://www.usnews.com/news/blogs/washington-whispers/2013/07/17/new-york-city-allocates-500k-to-fight-feds-on-deportation>.

<sup>48</sup> See ABA Resolution 105 (Aug. 2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_105\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf) (outlining basic principles for rights to counsel in civil proceedings, including treatment of waiver).

make them the best choice. Reyes gives the highest score to volunteer CASAs primarily based on political feasibility, while conceding the CASAs approach has only a moderate chance of making a difference and ensuring due process. There is indeed a concern about whether CASA can make a big enough difference: can an entirely volunteer/pro bono program, even one embracing non-lawyers, meet the need of those in immigration proceedings, given the 400,000 removals that were conducted in 2012 alone? Despite the massive numbers of pro bono programs nationwide, the “justice gap” (i.e., the percentage of unmet need among low-income people) for civil cases generally has remained at about 80 percent.<sup>49</sup>

Reyes evaluates the appointed counsel option as one that would “respect due process, enhance transparency, advance judicial economy and have a strong likelihood of successfully providing immigrants their best chance at fair process in removal proceedings.” But she lowers its rating due to political feasibility concerns, as “it would require either that Congress pass immigration-related legislation, or that the judiciary wade into this publically volatile and jurisprudentially complicated morass of legal issues.” She also suggests that impact litigation is not likely to be successful, citing the recent *Turner* decision as proof. Maurice Hew strikes a similar note about the uphill battle for impact litigation in his article, *Expanding the Civil Privilege of Being Represented by Counsel Through the Presumed Prejudice Doctrine*.<sup>50</sup> However, the tide might be changing on these points. As noted earlier, Congress is weighing the passage of substantial legislation on the right to counsel in some immigration cases, and recently a federal court has found a right to counsel for immigration detainees with mental disabilities under the Rehabilitation Act (the 1973 precursor to the ADA that applies to federally funded programs).<sup>51</sup> In the same week the federal court decision was announced, the Justice Department indicated it would implement the decision nationwide.<sup>52</sup> Moreover, in ruling against the right to counsel,

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<sup>49</sup> LEGAL SERV. CORP., *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2009), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

<sup>50</sup> 17 D.C. L. Rev. (forthcoming Spring 2014).

<sup>51</sup> *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), (C.D. Cal. April 23, 2013).

<sup>52</sup> Julia Preston, *In a First, Judge Orders Legal Aid for Mentally Disabled Immigrants Facing Deportation*, N.Y. TIMES, Apr. 24, 2013, available at

the *Turner* case relied on two points aspects of civil contempt proceedings: 1) the lack of the government as prosecutor in the case before it; and 2) the Court's perception of the simplicity of such proceedings.<sup>53</sup> The Court suggested its feeling on the need for appointed counsel might indeed be different if these two factors were different, as they undeniably are for immigration proceedings.<sup>54</sup>

Maurice Hew also raises the question of how to treat failures to provide counsel in immigration cases, should a right to counsel exist. In criminal cases, Hew notes, it is settled law that when counsel is completely denied, prejudice is presumed.<sup>55</sup> However, the law in civil cases when counsel is denied is all over the map: some courts apply or decline to apply prejudice without a discussion of the appropriateness of the "presumed prejudice" doctrine,<sup>56</sup> some conclude that a denial of counsel is reversible per se,<sup>57</sup> and some hold that a demonstration of

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[http://www.nytimes.com/2013/04/25/us/legal-aid-ordered-for-mentally-disabled-immigrants.html?ref=politics&\\_r=0](http://www.nytimes.com/2013/04/25/us/legal-aid-ordered-for-mentally-disabled-immigrants.html?ref=politics&_r=0).

<sup>53</sup> 131 S. Ct. at 2519.

<sup>54</sup> *Id.* at 2520. Interestingly, Reyes suggests that litigation is a less desirable approach because "judicially created law is always subject to judicially created revisions, and the level of expanded access to counsel achieved via impact litigation is thus vulnerable to volatility." Yet stare decisis at least provides some shelter from arbitrary revisions of past opinions. Congress and federal agencies, on the other hand, can freely revise statutes or regulations without having to contend with any such concern.

<sup>55</sup> See *United States v. Cronin*, 466 U.S. 648 (1984).

<sup>56</sup> See, e.g., *Hughes v. Division of Family Services*, 836 A.2d 498 (Del. Supr. 2003) (finding that failure to appoint counsel at outset of dependency/neglect proceedings was harmless error because parent would have lost anyway; court undergoes no analysis on whether application of harmless error is appropriate); *State ex rel. Juvenile Dep't of Multnomah Cnty v. Grannis*, 680 P.2d 660, 665 (Or. App. 1984) ("The trial court erred by denying mother's request for appointed counsel. However, the error was harmless."); *A.T.P. v. State*, 427 So.2d 355 (Fla. App. 1983) (observing that in dependency action involving delinquency, child did not have counsel and was not advised of right to be represented by privately retained counsel or given time to find counsel; court finds it is error and reverses without discussion about prejudice); *In Interest of S.R.H.*, 15 Kan.App.2d 415, 809 P.2d 1 (Kan. App. 1991) (reversing based on denial of counsel, but not engaging in any discussion of prejudice, harmlessness, or standards for reversal), *abrogated on other grounds*, *In re J.A.H.*, 285 Kan. 375, 172 P.3d 1 (Kan. 2007).

<sup>57</sup> See, e.g., *People ex rel. R.D.*, 277 P.3d 889 (Colo. App. 2012) ("A majority of other jurisdictions addressing the issue have concluded that the violation of a respondent parent's statutory or constitutional right to counsel in a termination of parental rights hearing is either reversible error per se or structural error ... given the importance of the statutory right to counsel in termination of parental rights hearings, the deprivation of that statutory right constitutes reversible error per se"); *In re J.M.B.*, 676 S.E.2d 9 (Ga. App. 2009) (court reverses own precedent to hold that

prejudice is required.<sup>58</sup> Some commentators have urged the application of the per se prejudice test, particularly in the child welfare arena.<sup>59</sup> There is good reason for use of a per se prejudice test: as Justice Scalia has put it, to attempt harmless error analysis when counsel is completely denied is to engage in “a speculative inquiry into what might have occurred in an alternate universe.”<sup>60</sup>

Finally, Hew addresses the concern that even if immigrants obtain a right to counsel, it will be of little use if the criminal conviction forming the basis for deportation is obtained in an improper way—such as through denial of criminal defense counsel, failure of criminal defense counsel to warn about immigration consequences, fast-tracked criminal prosecutions, or conflicts of interest by counsel. In these situations, Hew concludes, the problems should be considered harmful per se on the subsequent immigration proceeding and require reversal of the criminal conviction.

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"when the state is terminating a parent's 'fundamental and fiercely guarded right' to his or her child, although technically done in a civil proceeding, the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process"); *In re* S.S., 90 P.3d 571, 575-76 (Okla. Civ. App. 2004) (involving termination of parental rights case where parent deprived of counsel for first half of proceedings; court holds that “the actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice ....When a defendant is deprived of counsel, it is inappropriate to apply either the prejudice requirement or the harmless error analysis ....”); *In re* Torrance P., Jr., 2006 WI 129, 298 Wis.2d 1, 724 N.W.2d 623 (Wis. 2006) (“[S]tructural errors ‘seriously affect the fairness, integrity or public reputation of judicial proceedings’ and are so fundamental that they are considered per se prejudicial. Depriving a parent of the statutory right to counsel in a termination of parental rights proceeding deprives the parent of a basic protection without which, according to our legislature, a termination of a parental rights proceeding cannot reliably serve its function.”).

<sup>58</sup> See, e.g., *In Interest of Tiffany Marie S.*, 470 S.E.2d 177 (W.Va. 1996) (in termination of parental rights proceeding, “[w]e do not find that [mother] was prejudiced by the failure of the circuit court to appoint counsel. It appears that [mother] is arguing that, when counsel is not appointed timely, all proceedings conducted without counsel should be presumed void. Though it certainly can be argued that strong reasons of public policy justify such a burden-shifting scheme, our cases have not committed to such a theory except in criminal cases involving critical stages....While this point is intellectually interesting, we defer a definitive decision on it to a different day. After all, there is no clear indication that [mother] requested the appointment of counsel because of indigency.”).

<sup>59</sup> See, e.g., Vivek Sankaran, *No Harm, No Foul? Why Harmless Error Analysis Should Not Be Used To Review Wrongful Denials Of Counsel To Parents In Child Welfare Cases*, 63 S.C. L. REV. 13 (2011).

<sup>60</sup> *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

One observation relates to his suggestion that a right to counsel is “impractical” and “serves little purpose” when an immigration respondent is subject to mandatory deportation. Even where the respondent has committed certain crimes that make the respondent ineligible for many kinds of removal relief, there may still be some avenues of relief available for an attorney to explore, such as withholding of removal or relief under the Convention Against Torture. Moreover, a lawyer could challenge whether the crime(s) committed actually meet the standard of “aggravated felony” that mandate deportation, particularly where the state’s definition of the crimes vary from the federal definition.

All together, these articles cover much of the current debate around the right to counsel in immigration proceedings, a timely topic given Congress’s contemplation of comprehensive immigration reform.

#### **IV. CIVIL RIGHT TO COUNSEL PILOTS: DEMONSTRATING PROOF OF CONCEPT**

Clare Pastore’s article, *Gideon is My Co-Pilot: The Promise of Civil Right to Counsel Pilot Programs*, explores efforts to gather data demonstrating the necessity or benefits of providing counsel in various types of civil cases.<sup>61</sup> Pastore notes there has been an uptick in interest in such empirical research, which is not surprising: while the effects and costs of providing counsel are of obvious interest to legislators, they also factor into the standard due process analysis for courts, in terms of the risk of error and the state’s interest.

Pastore also points out that pilots can help us determine whether there are any situations where something less than counsel might suffice. But we must know precisely *which* situations those are. One fundamental difference between right to counsel supporters and those in favor of other solutions seemingly boils down to a difference of opinion as to how many cases will receive “justice” when something less than full representation is provided. This is indeed a relevant inquiry: as the Supreme Court once observed, the Court determines the process due by looking at “the generality of cases, not the rare exceptions.”<sup>62</sup> The pilots might help answer the question of whether a certain type of case “generally” needs counsel to ensure an accurate outcome. Of course, the risk of error is not the entire inquiry: sometimes the interests might be of sufficient strength such that even a

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<sup>61</sup> 17 D.C. L. Rev. (forthcoming Spring 2014).

<sup>62</sup> Mathews v. Eldridge, 424 U.S. 319, 344 (1976).



lower risk of error will not overcome the need for counsel. But certainly the data about the impact of counsel and the effectiveness of alternative solutions is essential to the debate.

Pilots do come with some caveats: they can be expensive to run, and the entity proposing the pilot cannot be certain that the results will be positive, or even conclusive. Unexpected difficulties can arise: as Pastore notes, one of the Massachusetts housing pilots ran into the problem of two different pilot sites providing different levels of “full representation.” Pilots that implement two kinds of improvements at the same time and at the same site (such as a pilot adding both a court improvement project and representation) may have difficulty untangling which addition caused which particular result. Additionally, there are many variables that can skew the results of a study (judge temperament, skill level of specific attorneys, precise type of mediation programs available at particular courts, and so on) and it is dangerous to extrapolate broadly upon the results of one study in one subject area conducted in one particular court.<sup>63</sup> The more studies we produce, the better we can understand the results we have been given.

There are also difficult questions that have to be answered with respect to metrics. For instance, if a tenant who receives *pro se* assistance is able to avoid an eviction, would we still consider that result “just” if we knew that the tenant also would have received a money judgment for breach of the warranty of habitability had the tenant been represented? Pastore also warns that “success” can be a very subjective concept. For example, if an eviction pilot defines “success” based solely on whether a tenant was evicted, it would be overlooking the fact that a represented tenant might receive a 3-month stay of the eviction execution, a stay that might help the tenant avoid homelessness or wind up with their belongings on the street.

Despite these acknowledged difficulties, research is vitally important, and not just on civil right to counsel, but rather for *any* proposed solution to the justice gap, be it *pro se* assistance, court simplification, or non-lawyer assistance.<sup>64</sup> In the end, we must know

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<sup>63</sup> See, e.g., Brief of Respondents at 54-55, *Turner v. Rogers*, 131 U.S. 2507 (2011) (No. 10-10) 2011 WL 481836 (citing representation study in Boston of unemployment cases in support of argument that counsel makes little difference in South Carolina civil contempt proceedings).

<sup>64</sup> See Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 *DRAKE L.R.* 845, 879 (2013), available at <http://students.law.drake.edu/lawReview/docs/lrVol61-3-Zorza.pdf>

what results we can expect for all solutions, be they expensive or cheap, complex or simple, politically popular or an uphill battle. I would suggest that an option should not be selected for the sole reason that it is the most financially or politically viable; it must be effective as well.

### CONCLUSION

The articles in this Symposium issue present plenty of fodder for debate and demonstrate the complexity and breadth of the discussion around the right to counsel in civil cases. There are difficult questions to answer regarding the interests at stake, the need to promote faith in the judicial system, the viability of alternatives, the financial considerations, the risk of error, the political realities, and many more. But regardless of how one comes out on these questions, there is no denying that the issue has come to the forefront and is likely here to stay.

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(discussing need for research agenda in investigating effectiveness of court simplification proposals).